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IN THE

Supreme Court of the United States

MICHAEL DONALD DODD,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United Stated Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In his initial brief, Mr. Dodd argued that the limitation period in paragraph 6(3) does not begin to run unless and until all three of its conditions have been satisfied. That is, the one year period does not begin to run until the right asserted "was initially recognized" by this Court, the right "has been newly recognized" by this Court, and the right has been "made retroactively applicable" to collateral cases. This interpretation fits comfortably with the plain language of paragraph 6(3) by giving meaning to all three of its requirements, and respects Congress' use of the past tense in defining those requirements. It also respects Congress' express creation of an exception to finality for new rights that apply retroactively,

by allowing for the realistic possibility of both initial and second or successive motions premised on such rights. Moreover, it assures the similar treatment of similarly-situated movants, and promotes judicial efficiency by limiting frivolous motions.

The Government concedes that paragraph 6(3)'s plain language states three requirements in the past tense, but argues its language also requires that the one-year period begins to run when, and only when, this Court initially recognizes the right asserted. This poses an interpretational dilemma for the Government. If the one-year limitation period begins to run with initial recognition, and Congress' use of the past tense is respected, paragraph 6(3) is reduced to a nullity, because retroactivity decisions almost always come more than a year after a decision of this Court initially recognizing a right. Even the Government admits that Congress could not have intended so absurd a result.

The Government's answer to this dilemma is to ask the Court to alter Congress' use of the past tense and rewrite paragraph 6(3)'s third requirement to read "*is* made retroactively applicable," thereby allowing the retroactivity determination to be made at some undefined point in the future. Of course, to rewrite the statute in the manner the Government suggests, the Court must not only ignore paragraph 6(3)'s plain language, and *Tyler v. Cain*, 533 U.S. 656 (2001), but also Congress' failure to enact the "is made retroactively applicable" language championed by the Government when it was stated in a predecessor proposal to paragraph 6(3).

But even with this rewriting, problems remain. The Government concedes that its interpretation of paragraph 6(3) virtually eliminates the possibility of a second or successive section 2255 motion premised on a new rule of constitutional law that applies retroactively to collateral cases. It also admits that its interpretation will likely result in the disparate treatment of similarly-situated movants. Finally, the Government

concedes that by allowing the retroactivity decision to be made at some point in the future, its interpretation of paragraph 6(3) will result in frivolous motions being brought based on rights that clearly are not retroactive.

In the end, the Government must turn to policy reasons to justify its drastic rewriting of paragraph 6(3), but these too fall short. At bottom, the Government asserts that Congress intended to interpose the shortest possible deadline for seeking review under section 2255. But that premise is belied by the very existence of paragraph 6(3) and paragraph 8(2) of section 2255, which allows for second or successive motions containing a new rule of constitutional law made retroactive to collateral cases. In both paragraphs 6(3) and 8(2), Congress provided an exception to finality based upon new, retroactively applicable decisions of this Court. To adopt the Government's view would be to believe that Congress intended to provide an avenue for relief based on these retroactively-applicable rights and yet drafted legislation that does not allow a realistic possibility for relief.

In sum, the Court should decline the Government's invitation to rewrite paragraph 6(3), and instead conclude that the triggering date for paragraph 6(3) is the date on which all three of its prerequisites have been satisfied—here, when the Eleventh Circuit decided in *Ross v. United States*, 289 F.3d 677 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 944 (2003), that this Court's decision in *Richardson v. United States*, 526 U.S. 813 (1999), was a right newly recognized by this Court that applied retroactively to collateral cases.

ARGUMENT

I. THE GOVERNMENT'S INTERPRETATION OF PARAGRAPH 6(3) REQUIRES THE COURT TO ALTER CONGRESS'S USE OF THE PAST TENSE, IGNORE *TYLER V. CAIN*, ADOPT STATUTORY LANGUAGE REJECTED BY CONGRESS, AND RENDER SUPERFLUOUS PARAGRAPH 6(3)'S SECOND CLAUSE.

The Government argues that "[t]he unambiguous language of paragraph 6(4)'s [sic] main clause resolves this case," and, therefore, paragraph 6(3)'s one-year period of limitation runs from only one date—the "date on which the right asserted was initially recognized by the Supreme Court." Govt. Brf. 11, 12. This interpretation of paragraph 6(3), however, requires the Government to confront the purpose of its second clause: "if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."

The Government concedes that the "most natural reading" of the language in paragraph 6(3)'s second clause—"*has been* newly recognized by the Supreme Court and *made* retroactively applicable to cases on collateral review"—is that it is phrased in the past tense. Govt. Brf. at 19. The Government further concedes that reading the "made retroactively applicable" language in the past tense "would also be consistent with this Court's construction" of similar language in *Tyler v. Cain*, 533 U.S. 656 (2001). Govt. Brf. at 19-20. Moreover, the Government admits that if the one-year period of limitation begins to run with initial recognition, and Congress' use of the past tense is respected, "a Section 2255 motion is untimely under paragraph 6(3) unless, at the time it is filed, a court already had made the new right retroactively applicable." Govt. Brf. 20. Such an interpretation, the Government recognizes, would reduce paragraph 6(3) to a nullity, because retroactivity decisions almost always come more than a year

after a decision of this Court initially recognizing a right. Govt. Brf. 20-22. The Government admits that Congress could not have intended so absurd a result. Govt. Brf. 22-23.

The Government's answer to this dilemma is to ask the Court to hold "that the 'if' clause is satisfied so long as the newly recognized right is *held to be retroactive* by some court with jurisdiction over the petition." Govt. Brf. 23. Of course, to rewrite the statute in the manner the Government suggests, the Court must not only ignore paragraph 6(3)'s plain language and *Tyler*, but also Congress' rejection of a predecessor proposal to paragraph 6(3) that used the identical "*is* made retroactively applicable" language the Government now champions. *See* Violent Crime Control and Law Enforcement Act of 1995, S.3, 104th Cong. § 508 (1995) (emphasis added). The Court "ordinarily will not assume that Congress intended to enact statutory language that it has earlier discarded in favor of other language." *Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) (internal quotation marks omitted). It should not do so here. The Government's rewriting of paragraph 6(3) also requires this Court to overlook Congress' express use of the phrase "is made retroactively applicable" in 28 U.S.C. § 2264, another provision enacted by the Anti-terrorism and Effective Death Penalty Act of 1996, Pub. L.104-132,110 Stat. 1214 (1996), but its failure to do so in paragraph 6(3).

Finally, rewriting paragraph 6(3) to allow the retroactivity decision to be made at some point in the future renders the second clause of paragraph 6(3) superfluous to any determination of the timeliness of the motion. The Government asserts that its view of paragraph 6(3)'s second clause does not render that clause mere surplusage,[1] because it "serves the

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[1] Inconsistently, the Government also argues that the phrase "has been newly recognized by the Supreme Court" in the second clause of paragraph 6(3) is surplusage because it "essentially just repeats the preceding phrase ('initially recognized by the Supreme Court')." Govt. Brf. 15. This

genuine function of explicitly identifying the cases in which the identified date is available to establish the timeliness of a Section 2255 motion." Govt. Brf. 15. But in reality, this "timeliness" determination is of no moment. If the "initially recognized" right relied upon to start the limitations period is a "new" right, then no collateral relief is available unless that right also applies retroactively. *Teague v. Lane*, 489 U.S. 288 (1989). If the new right does not apply retroactively, the fact that the motion would also be time-barred under paragraph 6(3) is inconsequential, because any entitlement to relief would already be barred by *Teague*.

Indeed, the Government's rewriting of the second clause of paragraph 6(3) significantly broadens the limitation provision's scope. If paragraph 6(3) is read to allow the one-year period to begin to run only on "the date on which the right asserted was initially recognized by the Supreme Court," a section 2255 movant could file a motion under paragraph 6(3) every time this Court issues a decision recognizing a right, regardless of whether that right is "new" or "made retroactively applicable." Although the Government describes its reading of paragraph 6(3) as "narrowly circumscribed," Govt. Brf. 15, it is, in reality, anything but.

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is incorrect. As the Eleventh Circuit noted, the common-sense and ordinary meaning of "initially" is "from the beginning" or "in the first place." JA 25 (citing *Webster's Third New International Dictionary* 1164 (1961)). In contrast, whether the right at issue is "newly recognized" is informed by this Court's jurisprudence under *Teague v. Lane*, 489 U.S. 288 (1989), as to when a constitutional rule of criminal procedure is "new." *See United States v. Hopkins*, 268 F.3d 222, 224-25 & n.2 (4th Cir. 2001); *Peterson v. Cain*, 302 F.3d 508, 511 (5th Cir. 2002). Indeed, as part of its "threshold" *Teague* analysis, a court may determine that a right, if it existed, would be both "new" and retroactively applicable, and yet decline to find the right exists—that is, decline to "initially recognize" the "new" right. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 329-330, 340 (1989). Accordingly, a "newly recognized" right is not necessarily an "initially recognized" right.

II. INTERPRETING PARAGRAPH 6(3) TO RUN UPON INITIAL RECOGNITION IS INCONSISTENT WITH ITS PURPOSE TO PROVIDE AN EXCEPTION TO FINALITY FOR THOSE FEW IMPORTANT NEW RIGHTS THAT APPLY RETROACTIVELY, AND ENCOURAGES THE FILING OF FRIVOLOUS MOTIONS.

Not only does the Government ask the Court to rewrite paragraph 6(3), but it asks the Court to do so in a way that runs contrary to Congress' very purpose in enacting paragraph 6(3)—to provide an exception to finality for prisoners seeking relief on claims premised on those few important decisions of this Court that have been held to apply retroactively to collateral cases, including such claims raised in second or successive motions. Given this purpose, the Government's interpretation of paragraph 6(3) is problematic.

First, the Government admits its view of paragraph 6(3) will virtually eliminate the possibility of second or successive motions premised on new rules of constitutional law, but argues that "balancing of objectives" is for Congress to make. Govt. Brf. 25. Mr. Dodd's interpretation of paragraph 6(3), however, requires no such "balancing," but instead allows for the realistic possibility of second or successive motions, and thereby respects Congress' decision, in enacting paragraph 8(2) of section 2255, to allow such motions.

Second, the Government concedes that its interpretation of paragraph 6(3) could result in disparate treatment of similarly-situated movants, because some prisoners may "become bound by an ultimately incorrect and transitory ruling that the new right is not retroactive." Govt. Brf. 29. Nonetheless, the Government asserts that the loss of the ability to obtain relief for some movants is less important than the delay in obtaining relief that might be suffered by others. Govt. Brf. 30. The Government inappropriately elevates concerns about delay over concerns about the uniform application of the law. This

Court's retroactivity jurisprudence, which forms the very basis for paragraph 6(3), is premised on the notion that the "harm caused by the failure to treat similarly situated defendants alike cannot be exaggerated." *Teague*, 489 U.S. at 303-05, 315-16 (plurality opinion). Mr. Dodd's interpretation of paragraph 6(3) strikes the appropriate balance, in that it allows for the possibility that should a lower court make an incorrect retroactivity decision, that incorrect decision will only delay, not deny, the possibility of relief.

The Government also expresses concern that if the one-year period does not begin to run on the date that this Court initially recognizes the right asserted, this would yield different start dates for the limitation period in different jurisdictions, and therefore result in movants obtaining relief at different times. Govt. Brf. 28. But similarly-situated litigants obtain relief at different times in different jurisdictions every day; this is simply a function of the vagaries of the processing of cases by the courts. Indeed, prisoners raising collateral claims seeking the benefit of new decisions of this Court often obtain relief in different jurisdictions at different times, depending on when a given circuit court or this Court holds that the new right applies retroactively to collateral cases under *Teague*.

Finally, the Government admits that its reading of paragraph 6(3) would result in frivolous motions being brought based on rules that are clearly not retroactive, but argues that "[t]he courts are likely not to have great difficulty disposing of frivolous applications for collateral review." Govt. Brf. 31. The Court, however, should not underestimate the burden the Government's interpretation of paragraph 6(3) may place on the federal courts every time this Court issues a decision.

In fiscal years 1998-2004, an average of 68,472 defendants were convicted and sentenced each year by the United States District Courts. *See* Administrative Office of the United States Courts, Judicial Facts and Figures, Table 3.5, United

States District Courts, Criminal Defendants Disposed of by Method of Disposition, available at www.uscourts.gov/judicialfactsfigures/table3.05.pdf, updated with FY2004 information provided by the AO. For those same years, the number of motions to vacate sentence filed in the district courts is as follows:

Fiscal Year	Motions to Vacate Sentence
1998	6,287
1999	5,752
2000	6,341
2001	8,644
2002	6,107
2003	5,832
2004	7,137

See Administrative Office of the United States Courts, Judicial Facts and Figures, Table 2.9, United States District Courts, Prisoner Petitions Filed by Nature of Suit, available at http://www.uscourts.gov/judicial factsfigures/table2.09.pdf, updated with FY2004 information provided by the AO.

The marked increase in filings in fiscal years 2001 and 2004 demonstrate the potential impact of the Government's reading of paragraph 6(3). Not including those two years, an average of 6,063 section 2255 motions were filed each year. In FY2001, the number of filings increased by 42 %, to 8,644 motions. The Administrative Office of the United States Courts attributes this increase to the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Id.* In FY2004, which ended in September 2004, the number of section 2255 motions filed again increased noticeably, to 7,137. This increase likely represents the first wave of prisoner filings in response to the Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which was issued in June 2004.

In light of the reading of paragraph 6(3) adopted by the minority of circuits and espoused by the Government, these prisoners likely felt compelled to file motions raising *Apprendi* and *Blakely* claims within a year of those decisions, because the failure to file might result in forfeiture of any possible right to relief. In contrast, under Mr. Dodd's view of paragraph 6(3), federal prisoners would not need to file until the resolution of the question of whether a new ruling by this Court applies retroactively. Given how few new rights are held to apply retroactively, this approach would dramatically limit the number of frivolous filings.

III. ALTHOUGH FILED BEFORE *ROSS* MADE *RICHARDSON* RETROACTIVELY APPLICABLE TO COLLATERAL CASES, MR. DODD'S MOTION IS TIMELY.

In summary, under paragraph 6(3), the one-year limitation period began to run on April 19, 2002, when the Eleventh Circuit held in *Ross v. United States*, 289 F.3d 677 (11th Cir. 2002), *cert. denied*, 123 S. Ct. 944 (2003), that the Court's decision in *Richardson v. United States*, 526 U.S. 813 (1999), initially recognized a new right that was made retroactively applicable to collateral cases. Mr. Dodd therefore had until April 19, 2003 to file his section 2255 motion. Because he filed his motion more than two years *before* that date, on April 4, 2001, it was timely. The Government, however, asserts that because Mr. Dodd filed his motion before the Eleventh Circuit's decision in *Ross*, the motion was premature, and therefore untimely even under the reading of paragraph 6(3) Mr. Dodd proposes. Govt. Brf. 28 n.9. That is simply not the case.

On July 29, 2002, soon after the Eleventh Circuit issued its decision in *Ross*, Mr. Dodd filed with the district court a motion seeking leave to supplement his section 2255 motion under Federal Rule of Civil Procedure 15(d). Petitioner's

Motion for Leave to Supplement and Citation to Supplemental Authority. In his motion, Mr. Dodd notified the district court of the decision in *Ross* and argued that his motion was timely because the one-year limitation period did not begin to run under paragraph 6(3) until the date *Ross* was decided. *Id.*

Assuming Mr. Dodd's initial section 2255 motion was premature, the filing of his motion to supplement under Rule 15(d) cured any prematurity. A section 2255 motion may be amended or supplemented in the same manner as any other civil pleading under Federal Rule of Civil Procedure 15. *See* 28 U.S.C. § 2242; Rule 11, Rules Governing § 2255 Proceedings. Under Rule 15(d), a party may supplement a pleading to "set[] forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented." Fed. R. Civ. P. 15(d). Leave to supplement may be granted "even though the original pleading is defective in its statement of a claim for relief." *Id.* A motion to supplement under Rule 15(d) is the appropriate vehicle for curing a defective pleading—including one that is premature—where subsequent events effectively cure the deficiencies in the initial effort. *See*, 6A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE AND PROCEDURE § 1505 at 189-192 (2d ed. 1990); *Mathews v. Diaz*, 426 U.S. 67, 75 & n.8 (1976); *Franks v. Ross*, 313 F.3d 184, 198 (4th Cir. 2002). Accordingly, even assuming Mr. Dodd's initial section 2255 motion was premature, the filing of his motion to supplement under Rule 15(d) cured any prematurity. His motion is timely.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the court of appeals, hold that Mr. Dodd's section 2255 motion is timely, and remand the case for consideration of the merits of Mr. Dodd's motion.

Respectfully submitted,

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